**Raleigh County Commission on Aging, Inc. *and* District 1199, The Health Care and Social Service Union, SEIU, AFL–CIO, Petitioner.** Case 9–RC–17318

July 31, 2000

## DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered objections to an election held December 1, 1999, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 30 for and 41 against the Union, with 2 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, and has decided to adopt the hearing officer's findings[1] and recommendations[2] only to the extent consistent with this Decision and Certification of Results of Election.

The hearing officer found that the Employer engaged in objectionable conduct by announcing to employees, at a mandatory meeting held two days before the election, that the Employer would have a dinner for employees to celebrate the Employer's victory in the upcoming representation election. For the reasons set forth below, we disagree.

On November 29, 1999,[3] the Employer held the last in a series of mandatory employee meetings about the upcoming representation election. At this meeting, the Employer's executive director, Jacqueline Reid, discussed the election and asked employees to vote against the Union. Reid also told employees that the Employer was going to have a dinner for them to celebrate (what she anticipated would be) the Employer's victory in the upcoming election.[4]

By letter to its employees dated December 8 (1 week after the election), the Employer thanked those employees who supported the Employer during the organizing campaign, and announced "[a]s promised, we will have our Victory Celebration and Christmas Dinner on Thursday, December 16, 1999." The dinner was held on December 16. About 30 unit employees attended, and many of them brought guests. The dinner was fully catered and cost the Employer about $15.25 a person.

The hearing officer found that the Employer's preelection announcement of the dinner was objectionable. Noting that the Employer had never held such a dinner in the past, the hearing officer rejected the Employer's contention that the dinner was held as a Christmas dinner. The hearing officer found the instant facts analogous to those in *B & D Plastics, Inc.*, 302 NLRB 245 (1991), where the Board found that an employer engaged in objectionable conduct by giving employees a day off, with pay, 2 days before the election in order to attend a cookout. The hearing officer found Reid's announcement to be similarly objectionable because it was made 2 days before the election and was offered to all bargaining unit employees as an inducement to vote against the Union. Relying on the fact that the dinner was fully catered and cost the Employer $15.25 per person, the hearing officer found that the dinner could be viewed as a substantial benefit to these employees, who earn little over $5 an hour.

Contrary to the hearing officer, we find that Reid's announcement was not objectionable. The Board has long held that a promise to supply food and beverages at a postelection victory party is not necessarily coercive or destructive of an atmosphere in which a free choice can be made. E.g., *Movsovitz & Son, Inc.*, 194 NLRB 444 (1971) (union representative's promise to buy beer and whiskey for employees "after the [u]nion won the election" not objectionable). See also *NLRB v. L & J Equipment Co*., 745 F.2d 224, 231–232 (3d. Cir. 1984) (union's promise to hold a dinner dance for all employees in the event of a union victory not objectionable because the effects of such a celebration would be of such limited duration that it would not "substantially influence employees in a decision having a major effect on their working lives").

Here, as the hearing officer found, Reid's announcement of "a dinner" was solely linked to the idea of celebrating an anticipated victory by the Employer in the election. The announcement included no details about the dinner, and made no promise of anything of significant value. Although it was clear from the announcement that a meal of some sort would be served, the only detail conveyed by this announcement was that the purpose of the event would be to celebrate the Employer's victory.

We disagree with our dissenting colleague that any mention of a victory party is an objectionable promise of benefit because of the food or drink that would presumably be served. Our colleague's contention misses the

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule Objection 2.

[3] All dates are in 1999 unless stated otherwise.

[4] We find no merit to the Employer's contention that the hearing officer failed to properly consider the testimony of witnesses who testified that Reid's announcement of the dinner had nothing to do with the union election or its outcome. We find that the hearing officer credited the testimony of those witnesses, including Reid, who testified that Reid linked the dinner announcement to the hope and anticipation that the Employer would win the election.

point that, to the extent this announcement would reasonably have any appeal to employees, the appeal is not the refreshments, but rather the opportunity to celebrate the Employer's victory. In these circumstances, the food and drink is incidental to the opportunity to participate in the event.[5] In our view, the announcement cannot reasonably be viewed as anything more than a "legitimate form of campaign propaganda." *R. H. Osbrink Mfg. Co.*, 114 NLRB 940, 942 (1955).[6]

The hearing officer erred in relying on the fact that the dinner was fully catered and cost the Employer $15.25 a person. No such details about the dinner were announced to the employees prior to the election, and thus they could not have influenced employees' votes.

We also disagree with the hearing officer's reliance on *B & D Plastics, Inc.*, supra. The conduct at issue in that case involved a clearly granted benefit, in the form of a paid day off, 2 days before the election. It was not disputed that the sole purpose of this benefit was to enable employees to attend a preelection cookout where the employees could hear the employer's final antiunion message of the campaign. In finding that conferring the paid holiday to employees was objectionable, the Board reasoned that employees in such circumstances would reasonably construe the day off as an inducement to vote in favor of the employer's position.

Conversely, as noted above, Reid's announcement of a victory dinner did not promise anything of a significant value. Unlike *B & D,* the employees here were not told that they would be paid for their time at the dinner. Inasmuch as there was no mention of any details about the dinner, it is difficult to imagine such an announcement having any influence on employees' votes one way or another. In these circumstances, it is clear that Reid's announcement of a victory dinner is quite different from the employer's conduct in *B & D.*

In sum, we find that the Employer did not engage in objectionable conduct by announcing the intent to have a victory dinner after the election. Accordingly, we shall issue a certification of results of election.

[5] For this reason, we find the instant case distinguishable from *Crestwood Manor*, 234 NLRB 1097 (1978), which our dissenting colleague contends supports his position. In that case, the union's promised raffle could reasonably be appealing to an employee regardless of whether the employee would have otherwise supported the union. For the reasons stated above, the instant victory party—even with food—does not carry a similar appeal.

[6] We recognize that in *Trencor, Inc. v. NLRB*, 110 F.3d 268 (5th Cir. 1997), the Fifth Circuit reversed the Board's finding that a hearing on objectionable conduct was not warranted on an employer's allegation of an announcement by the petitioner union that if the union won the election it would host "the biggest party in the state of Texas." To the extent that that announcement could have reasonably suggested an event of great extravagance, that case is distinguishable from the instant conduct. However, insofar as the Fifth Circuit's decision can be construed as holding that any announcement of a postelection victory party with food and beverages is objectionable, we respectfully disagree with that decision.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for District 1199, The Health Care and Social Service Union, SEIU, AFL–CIO, and that it is not the exclusive representative of these bargaining unit employees.

MEMBER HURTGEN, dissenting.

Contrary to my colleagues, I find that the Employer engaged in objectionable conduct by promising employees, shortly before the election, that it would provide them with a dinner if the Employer won that election. I find that this offer constituted an inducement to employees to vote for the Employer, which inducement would reasonably interfere with employee free choice. Accordingly I would set aside the election.

As more fully set forth in the hearing officer's report, the Employer conducted the final in a series of mandatory employee meetings, 2 days before the election. During that meeting, in which it urged employees to reject union representation, the Employer announced that it would provide employees with a dinner to celebrate an election victory by the Employer. One week after the election—which the Employer won—the Employer wrote its employees, stating that "[a]s promised, we will have our Victory Celebration and Christmas Dinner on Thursday, December 16." The letter stated that the dinner would be held at the local armory and that each employee could bring, at no cost, a guest. The dinner was held, as promised. It was a catered dinner at which door prizes were awarded. The cost of the affair was $15.25 per person.

The hearing officer found that the announcement of a victory dinner to employees, shortly before the election, was objectionable because it constituted an inducement to vote against the Union. The hearing officer particularly noted that the offer was made to all unit employees, shortly before the election, in the context of an antiunion campaign meeting where attendance was required.

My colleagues reverse, concluding that the Employer's promise of a postelection victory celebration was "a legitimate form of campaign propaganda,"[1] and was thus unobjectionable. See, e.g., *Movsovitz & Son, Inc*., 194 NLRB 444 (1971). I disagree. Consistent with prior Board law, as set forth by the Fifth Circuit Court of Appeals in *Trencor, Inc. v. NLRB*, 110 F.3d 268 (1997), I find that the Employer's announcement interfered with the election.

The instant case is to be distinguished from those involving preelection campaign parties. Such preelection functions may be appropriate because they are designed to "induce employees to hear the message of the sponsor *and because they are not conditioned on the sponsor's*

[1] *R. H. Osbrink Mfg. Co*., 114 NLRB 940, 942 (1955).

*victory*." *Trencor*, 110 F.3d at 270 fn. 2. (Emphasis added.)

In the instant case, the benefit *was* conditioned on the sponsor's victory. In essence, the employees were told that defeat of the union would result in a benefit, while victory of the union would result in no benefit.

In this regard, the evidence shows that the benefit was conditional. That is, the Employer's promise of an employee dinner was conditioned on the Employer's prevailing in the election. The Employer made the offer in the course of its antiunion meeting, where it urged employees to vote against the Union. It also termed the event a "victory" dinner to celebrate its winning the election. In these circumstances, it was clear that the dinner would be given *if* the Employer won the election. This interpretation is consistent with employees' testimony that they understood the Employer to be promising the dinner if the Employer prevailed. Further, this interpretation was reinforced by the Employer's December 8 letter, thanking those employees who had supported the Employer during the organizing campaign, and announcing "as promised" the specifics of the "victory" dinner. Finally, even if the Employer's intention was to have the party even if it lost, employees could reasonably understand the contrary. That is, a reasonable interpretation of the Employer's offer was that it was conditional. *NLRB v. L & J Equipment Co*., 745 F.2d 224, 232 fn. 9 (3d Cir. 1984) ("[A]ny such promise is prima facie to be presumed contingent upon a victory, since the notion of a union-sponsored party in the event of a union defeat seems silly.")

Next, I find that the dinner reasonably would be viewed by unit employees as a benefit. The majority argues that the specifics of the dinner were not announced before the election, and thus the precise cost-per-person to be borne by the Employer was not known by the employees. However, the precise amount of the benefit is not a necessary element of the objection. Where, as here, a benefit is conditioned upon the election result, it is sufficient (for objection purposes) to show that there is *some* benefit. That is, compared to the "zero" amount that the employees would receive if the Union won the election, the employees would realize that they would receive "something" if the Union lost.

The foregoing point has been made by the Board itself. Indeed, the court in *Trencor* cited the Board's own rule as follows.

The Board stated in *Crestwood Manor,* 234 NLRB 1097 (1978), that "the conditioning of the receipt of benefits on favorable election results is impermissible conduct for parties engaged in the election."

The court also noted that "even minor inducements conditioned on a union or company victory can be improper." See fn. 7.

The Court went on to say that "even the potential benefit of $1.18 per employee was considered impermissible by the Board."

*Crestwood Manor*, supra, cited by the court, supports my position. In *Crestwood*, the Board set aside an election based on a union's promise to hold an employee raffle if it won the election. The Board found this promise objectionable because it conditioned receipt of benefits on favorable election results. The Board clearly recognized the consequences of a contrary result:

> [W]e might well envision future elections in which employers and unions alike might be tempted to promise employees all sorts of inducements - raffles, prizes, vacation trips, or whatever if their side won the election. Such an intrusion into the election process would be highly undesirable.

Id. at 1097–1098.

In sum, the amount of the benefit is not critical. It is the conditioning of the benefit that is critical. In any event, the party-dinner promised here would be viewed by employees as significant. The employees here were paid about $5 per hour, and received few or no benefits. Thus, they reasonably would view the promise of an unprecedented dinner as something of particular value. The fact that the benefit was in "kind," and not expressly monetary, does not warrant a contrary result.[2]

As noted above, the Employer promised a victory dinner. It is axiomatic that food and drink are served at a dinner. My colleagues assert that the promise is nonetheless privileged because "the appeal is not the refreshments, but rather the opportunity to celebrate the Employer's victory." I disagree. The food and drink is a benefit, and it is granted only if the employees vote against the union. Further, the employees who voted for the union will presumably not be celebrating the Union's loss. They will simply reap the benefits resulting from the fact that their fellow employees voted against the Union.

I also agree with the hearing officer that the Employer's purpose in promising the postelection dinner was to influence employee votes. In this regard, I note that the dinner was announced shortly before the election, during a mandatory meeting in which employees were urged to reject the Union. See generally *Lou Taylor, Inc*., 226 NLRB 1024, 1029 (1976), enfd. in relevant part 564 F.2d 1173 (5th Cir. 1977). Even had that not been the Employer's express intent in announcing the victory dinner, it was certainly reasonable for employees to perceive that to be its purpose. In my view, the conditional benefit in this context would reasonably interfere with employee free choice. Indeed, such a promised postelection victory dinner could present just the neces-

[2] See *Trencor, Inc. v. NLRB*, supra, 110 F.3d at 273. Cf. NLRB v. *L & J Equipment Co*., supra.

sary edge for those employees who had not otherwise made up their minds as to whether to support or oppose the Union.

The cases cited by my colleagues (*Movsovitz, Osbrink*, and *L & J Equipment*) were correctly distinguished by the court in *Trencor*. In regard to *Movsovitz* and *Osbrink*, see *Trencor,* supra, 110 F.3d at 270 fn. 2. In regard to *L & J*, see *Trencor,* supra at 272. More particularly, the court distinguished between cases where a postelection party is conditioned upon how the employees voted, and cases where a preelection party is held. The court noted that it was questionable whether a conditional promise was made in *Movsovitz*, and criticized the Board for confusing the "conditional promise" cases with the "pre-election party" cases. Further, unlike *L & J Equipment*, there is nothing in the instant case to suggest that the victory party was to lay the groundwork for a productive union-employee relationship. To the contrary, a victory party here would be held only if the union had *lost* the election. Finally, contrary to my colleagues' selective citation to *Osbrink*, the *Trencor* court also correctly noted that, in that case—unlike here—there was a very real question as to whether a conditional promise of a postelection benefit had even been made. Thus, the Board noted in *Osbrink* that the Regional Director had rejected the employer's argument that the union told the employees that there could be no victory party unless the union won the election, and instead concluded that that the union literature referencing the party was "a legitimate form of campaign propaganda." Further, the Board noted that there were no exceptions to the Regional Director's factual findings. 114 NLRB at 942.

Based on all of the above, I find that the Employer's promise of a postelection employee dinner if the Union were defeated constituted objectionable conduct. Therefore, I would set aside the election and direct a second one.